

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-2127

To be argued by
KENNETH V. HANDAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2127

DAVID HODGE,
Petitioner-Appellant,

—v.—

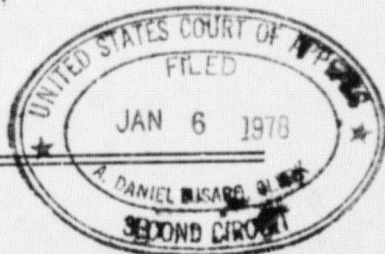
UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR THE UNITED STATES
OF AMERICA**

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2127

DAVID HODGE,
Petitioner-Appellant.

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Hodge appeals from an order entered on September 19, 1977, in the United States District Court for the Southern District of New York, by the Hon. Morris E. Lasker, United States District Judge, denying without a hearing his motion for post-conviction relief, pursuant to Title 28, United States Code, Section 2255.

Indictment S. 73 Cr. 849, filed on September 10, 1973, in seventeen counts charged Hodge and four other defendants with six counts of bank robbery, in violation of Title 18, United States Code, Sections 2113(a) and 2, and four counts of the use of a dangerous weapon in the

commission of certain of those bank robberies, in violation of Title 18, United States Code, Section 2113(d).*

Trial as to defendants Hodge and Morgan Holmes ** commenced on October 29, 1973, before the Honorable Murray I. Gurfein, then United States District Judge, and a jury. The Government elected to try Hodge and Holmes only on four counts charging bank robbery (Counts One, Three, Six and Sixteen) and two counts charging use of a dangerous weapon (Counts Seven and Seventeen). On November 1, 1973, the jury found Hodge guilty of the four counts of bank robbery and one count of assault (Count Seventeen),*** and found Holmes guilty of three counts of robbery **** and one count of assault.

On November 30, 1973, Judge Gurfein sentenced Hodge to concurrent terms of fifteen years imprisonment

* The other defendants named in the indictment were James Copeland, Melvin Davis, Morgan Holmes and Hoyt Gipson. Copeland was named in five counts; Davis was charged in one count; Holmes was charged in fifteen counts; and Gipson was named in four counts.

** On October 11, 1973, Gipson pleaded guilty to one count of the indictment. Copeland and Davis, each of whom had given a signed confession, were severed from Hodge's trial and were later tried individually in separate trials. Copeland was tried on November 2, 1973 before Judge Gurfein and another jury. On November 5, 1973 the jury found Copeland guilty on all four counts submitted to it. Davis was charged in one count with participating in a single bank robbery with Hodge, Holmes and Copeland. Trial began on November 9, 1973 before Judge Gurfein, sitting without a jury, and ended on the same day when Judge Gurfein found Copeland guilty.

*** A mistrial was declared as to Count Seven, which also charged assault.

**** At the close of the Government's case, Judge Gurfein acquitted Holmes on one bank robbery count.

on Counts One, Three, Six and Seventeen.* Hodge is currently serving his sentence in the United States Penitentiary, Lewisburg, Pennsylvania.**

On May 8, 1974, this Court affirmed the convictions of Hodge, Copeland, Davis and Holmes without opinion. *United States v. Hodge, et al.*, Dkt. No. 73-2749. Hodge was represented on that appeal by a second court-appointed counsel.

On May 11, 1976, Holmes filed a *pro se* motion pursuant to Title 28, United States Code, Section 2255, seeking post-conviction relief on the grounds that he was denied the right to proceed *pro se* in his own defense at his trial and that he was denied the effective assistance of counsel. On March 17, 1977, Judge Lasker in a memorandum opinion denied Hodge's motion on the first ground alleged (the claimed denial of defendant's right to proceed *pro se*), but appointed counsel to represent Hodge in connection with his claim of ineffective assistance of counsel.

On May 9, 1977, Hodge, now represented by appointed counsel, filed a second affidavit as well as a brief in support of his motion. On September 19, 1977, Judge Lasker, in an endorsement opinion, denied Hodge's motion without a hearing.

* Judge Gurfein did not sentence Hodge on Count Sixteen, since that count merged, as a matter of law, with the aggravated bank robbery charge embodied in Count Seventeen. See *Prince v. United States*, 352 U.S. 322 (1957); *Gorman v. United States*, 456 F.2d 1258 (2d Cir. 1972).

** On November 12, 1973, Gipson was sentenced to concurrent terms of fifteen years on Counts One, Eight and Thirteen. On December 12, 1973, Davis was sentenced to a term of ten years on Count One. On December 21, 1973, Holmes was sentenced to consecutive terms of twenty and twenty-five years on Counts Three, Six and Seventeen, respectively.

Statement of Facts

1. The Trial

For a full statement of the facts underlying Hodge's conviction, the Government respectfully refers the Court to the Government's brief on the direct appeal. See *United States v. Hodge, et al.*, Dkt. No. 73-2749.

Stated briefly, the evidence overwhelmingly showed that Hodge and his co-defendants executed a series of bank robberies—some armed and others without the use of weapons—over the course of seven weeks in 1973. At the joint trial of Hodge and Holmes the charges against them were established by eyewitness testimony, bank surveillance photographs, fingerprints, physical evidence and post-arrest statements of the defendants.

Specifically, the evidence that Hodge committed the robbery at the First National City Bank, 66 East 46th Street, New York, New York, (Count One) included an eyewitness identification by the victim bank teller (Tr. 62),* Hodge's fingerprints on the demand note (Tr. 320-321), and bank surveillance photographs, including one which Hodge had identified subsequent to his arrest as a photograph of himself (Tr. 118, 300). As to the bank robbery at the First National City Bank, 130 East 42nd Street, New York, New York (Count Three), the Government introduced evidence that Hodge's fingerprints were on the demand note (Tr. 320-321), as well as bank surveillance photographs, including one in which Hodge had identified himself (Tr. 132, 300). With respect to the hold-up at the Union Dime Savings Bank, 1925 Third

* "Tr." refers to pages of the transcript of the trial and the sentencing; "GX" refers to Government Exhibits at trial; "H" refers to pages of the transcript of the pretrial suppression hearing; "Br." refers to Hodge's brief on this appeal; and "A." refers to the Government's Appendix on this appeal.

Avenue, New York, New York (Count Six), Hodge had acted as a lookout in the robbery, a fact established by bank surveillance photographs of Hodge which showed him wearing eyeglasses and standing as a lookout. (Tr. 151, 300). The Government introduced a pair of eyeglasses seized from Hodge's apartment which matched those worn by him in the photographs from the robberies in Counts Three and Six. (GX 16; Tr. 279).

Finally, the evidence against Hodge on the bank robbery and assault charged in Counts Sixteen and Seventeen at the First National City Bank, 200 Park Avenue, New York, New York, included a confession by Hodge and bank surveillance photographs in one of which Hodge had identified himself as the robber portrayed. (Tr. 198-200, 300, 305-306). After Hodge and Holmes entered the bank, Hodge pointed a gun at the teller and obtained \$3,957. As Hodge headed for the door, he was pursued by a guard. Holmes then shot the guard twice in the back, and both Hodge and Holmes successfully escaped. (Tr. 190-221, 222-241, 241-263). As to this robbery, the Government introduced four items against Hodge which were seized in his apartment when he was arrested—a \$5 "bait" bill from the robbery, a shirt, a pair of trousers and the pair of glasses, all of which matched those worn by him in the photographs of the robbery. (GX 13-16; Tr. 264-279).*

2. The Pre-Trial Suppression Hearing

On October 12, 1973, Hodge, by his court-appointed trial counsel, Richard G. Rosenbaum, moved to suppress

* At trial it was stipulated between the Government and defendants' counsel that the following amounts were taken during the robberies: Count One—\$5,315 (Tr. 117); Count Three—\$2,855 (Tr. 135-136); Count Six—\$2,445.30 (Tr. 158); Count Sixteen—\$3,957 (Tr. 200).

all evidence obtained from his person and from his home on the alleged ground that the search was made without a warrant, without probable cause, and was not incidental to or during the course of an arrest. In addition, Hodge moved to suppress statements made by him to agents of the Federal Bureau of Investigation, after his arrest, on the ground that the statements were elicited when he was ill and unable to make any rational decision. This motion was made by a notice of motion, together with an affidavit of Hodge's counsel, Richard Rosenbaum, which recited in effect that the motion was grounded on information derived from "conversations with the defendant. . . ." (A. 1a-2a).

Thereafter, Judge Gurfein conducted a suppression hearing on Hodge's motion, at which the Government presented the testimony of FBI Agent Thomas Cotton, who arrested Hodge and seized certain physical evidence, and Agent Steven Heubeck, to whom Hodge made admissions at the FBI office.

Agent Cotton testified that he arrested Hodge at his apartment at 7:20 A.M. on August 17, 1973, only a few minutes after Copeland, who was identified at the hearing simply as an informant, had told Cotton that Hodge was one of the bank robbers. Cotton, who previous to the arrest had studied a number of bank surveillance photographs which clearly depicted the robbers during the hold-ups (H. 23), sought to verify Copeland's information by observing Hodge to determine whether he was the same man as the robber in the photographs. FBI agents surrounded Hodge's apartment, and then telephoned Hodge to advise him that his apartment was surrounded. Cotton and one other agent then knocked on Hodge's front door and said, "Open up, this is the FBI." (H. 12-13). Hodge opened the door, and Cotton immediately recognized him from the photographs as one of the

participants in the several bank robberies. Cotton then arrested Hodge (H. 23-24), handcuffed him (H. 14), and advised him of his constitutional rights (H. 5). The agents then looked through the other rooms of the apartment for other persons, for their own protection and for Hodge's protection. (H. 15). No evidence was seized during this search. Hodge's wife and children were in the apartment at this time.*

When Hodge was arrested he was in the living room wearing only boxer-type underwear. (H. 5, 7). Hodge asked Cotton to get him some clothes, and Cotton went into an adjoining bedroom where he obtained a pair of red knit trousers from a clothes basket. (H. 7). Before giving the trousers to Hodge, Cotton searched the trousers for security reasons and discovered a fistful of money that was later found to include a bait bill from one of the bank robberies. (H. 7-8). While assisting Hodge in putting on the trousers, Cotton saw two pairs of eyeglasses in plain view on top of a bureau dresser immediately behind Hodge. These glasses clearly resembled those worn by Hodge in one or more of the bank robberies and Cotton seized both pairs of glasses as evidence. (H. 10).

After Cotton assisted Hodge in putting on the trousers, Hodge asked his wife to get him a shirt. Hodge's wife went into another bedroom, accompanied by the agent. (H. 8). After she opened a clothes closet, Cotton observed two shirts and a pair of trousers which he recognized from a bank surveillance photograph as those worn by Hodge in one or more bank robberies. (H. 8-9). Cotton seized the two shirts and the trousers. (H. 9).

* Hodge's wife's mother later came to the apartment some time after the arrival of the agents. (H. 7).

After his arrest, Hodge was taken to FBI headquarters where he was fingerprinted and photographed. Prior to again advising Hodge of his rights, the agents asked him if he was sick, if he needed medical assistance, or if he was on drugs or was a narcotics user. To each question, Hodge responded, "No." (H. 36-37). Hodge then was advised of his constitutional rights for a second time, and signed an "Interrogation and Advice of Rights Form," acknowledging that he had been fully advised of his rights. (H. 26-27, 30). Hodge then identified himself in a bank surveillance photograph of the robbery at the First National City Bank, 200 Park Avenue, New York, New York (Counts Sixteen and Seventeen) and made incriminating statements concerning this robbery. (H. 30-31). Hodge also identified himself in bank surveillance photographs taken during the commission of three other bank robberies. (H. 32). Throughout the course of the interview, Hodge was alert, responsive and did not seem to be in physical difficulty of any sort. (H. 40-41).

Hodge presented no affirmative evidence at the suppression hearing, but relied solely on the cross-examination of the Government's witnesses. At the close of the hearing, Judge Gurfein denied Hodge's motion to suppress the physical evidence and the oral statements. (H. 44-46). Judge Gurfein ruled that there was probable cause for Hodge's arrest, that the evidence from his apartment was properly seized, and that Hodge's post-arrest confession was made voluntarily and with a knowing waiver of his constitutional rights.

3. The Direct Appeal

On the direct appeal from his conviction Hodge was represented by a second court-appointed attorney, Theodore Krieger. The only issue raised on appeal concerned the District Court's denial of the suppression motion, namely, whether Hodge's arrest was lawful. No issue

was raised on direct appeal concerning the alleged denial of effective assistance of counsel, the claim upon which Hodge now seeks post-conviction relief.

4. Hodge's § 2255 Motion and the District Court's Opinions

In his motion pursuant to Title 28, United States Code, Section 2255, Hodge sought post-conviction relief on two alleged grounds: first, that he had been denied the right to proceed *pro se* in his own defense at trial; and, second, that he was denied effective assistance of counsel in the representation by Richard Rosenbaum. As noted above, on March 17, 1977, Judge Lasker denied Hodge's motion on the first ground,* but appointed counsel to represent Hodge in connection with his claim of ineffective assistance of counsel. Subsequently, on May 9, 1977, Hodge filed additional papers in support of the second ground of his motion.

In his motion, Hodge alleged that his trial counsel had failed adequately to investigate the facts and circumstances surrounding Hodge's arrest, the seizures and his inculpatory post-arrest statements at the FBI office. Specifically, Hodge claimed that prior to the suppression hearing Rosenbaum never asked him for his version of the arrest and neglected to call as witnesses at the hear-

* On this appeal Hodge has not challenged Judge Lasker's denial of his motion on the alleged ground that his constitutional right to proceed *pro se* was violated.

Judge Lasker properly found as to this claim that Hodge never expressed any desire to waive his right to counsel and to proceed *pro se* at trial but sought only to have his counsel replaced by another attorney. (Tr. 4-6). This clearly was insufficient to invoke defendant's right to proceed *pro se*. See e.g., *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945). Nor was Hodge entitled both to representation by counsel and to *pro se* representation. *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976).

ing Hodge's wife and mother-in-law.* Hodge also averred that Rosenbaum determined that Hodge should not testify at the suppression hearing. On the basis of these allegations, Hodge claimed that he had been denied effective assistance of counsel.**

After reviewing the additional papers submitted by Hodge, as well as the full record of the trial and suppression hearing, Judge Lasker, in an endorsement opinion, dated September 19, 1977,*** denied Hodge's motion without a hearing. Judge Lasker rejected Hodge's belated claim that his counsel failed adequately to present defendant's version of his arrest at the suppression hearing, and found that the transcript of the hearing revealed only marginal differences between Hodge's present version of the events surrounding his arrest and the facts presented by his attorney at the hearing. The District Court noted that, in any event, the factual discrepancies now alleged were "certainly not enough to meet the heavy burden necessary to show failure of adequate representation." (A. 10a). Judge Lasker determined that the transcript indicated that defense

* Hodge did not proffer any affidavit from either his wife or mother-in-law, nor did his own affidavit indicate how the testimony of either relative would have been helpful to his suppression motion.

** In connection with his 2255 motion Hodge also filed an affidavit from his court-appointed trial counsel, Richard G. Rosenbaum, who stated that he visited Hodge three times at the Federal Detention Center prior to the suppression hearing, but that he had no sufficient present recollection to comment on Hodge's claim that he was not asked by Rosenbaum about the circumstances of the arrest.

In response to Hodge's motion, the Government filed the affidavit of an Assistant United States Attorney who had reviewed the record of the hearing and trial, together with a memorandum of law in opposition to the motion.

*** The District Court's endorsement order is reproduced in the Government's Appendix at A. 9a.

counsel's investigation of the facts was "fully adequate," and pointed out that on two occasions during the trial Judge Gurfein expressly found defense counsel's performance to be satisfactory.

Finally, the District Court rejected Hodge's claim that his counsel was ineffective because counsel would not permit Hodge to testify at the suppression hearing. Judge Lasker held that this was a reasonable exercise of the trial attorney's discretion to determine the best manner of presenting his client's case.

ARGUMENT

The District Court Properly Denied Hodge's 2255 Motion Without A Hearing.

Hodge contends that the allegations in his motion pursuant to Section 2255 entitled him to post-conviction relief, or, at a minimum, required an evidentiary hearing on the claim that he was denied effective assistance of counsel. Under the applicable law, however, the record of the suppression hearing and trial in Hodge's case, even when measured against the allegations set forth in movant's belated petition,* makes clear that Hodge at all

* Quite apart from the evident lack of merit to Hodge's motion, the relief he seeks is not now available since he deliberately bypassed the established orderly judicial procedures for review of his present claim. As noted in the Statement of Facts, Hodge was represented in the direct appeal from his conviction by an attorney wholly independent of Mr. Rosenbaum; nonetheless, he chose not to present the claim of ineffective assistance of counsel on that occasion, although the record upon which he now bases his argument existed then. Petitions for collateral relief may not be substituted for normal appellate review. *United States v. Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968); *United States v. Sobell*, 314

[Footnote continued on following page]

times received effective assistance of counsel. Judge Lasker, therefore, properly denied Hodge's motion since "the motion and the files and records of the case conclusively show[ed]" that Hodge was not entitled to post-conviction relief. 28 U.S.C. § 2255. See *Fontaine v. United States*, 411 U.S. 213, 215 (1973); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974).

This Court consistently has adhered to a stringent standard in determining ineffective assistance of counsel. As recently re-emphasized in *LiPuma v. Commissioner*, 560 F.2d 84, 88, 90 (2d Cir. 1977), it is only when counsel's performance may be considered so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice, that a denial of effective assistance of counsel will be found. See also *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, at 4536 (2d Cir., June 30, 1977); *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *United States v. Taylor*, 562 F.2d 1345, 1360 (2d Cir. 1977); *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). Judged against this time-honored

F.2d 314 (2d Cir.), cert. denied, 374 U.S. 857 (1963). See generally *United States v. Davis*, 417 U.S. 333, 345-46 (1974); *Sunal v. Large*, 332 U.S. 174 (1947); *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *United States v. Travers*, 514 F.2d 1171, 1176 (2d Cir. 1974). This principle has been found applicable to constitutional as well as statutory claims, and bars the present 2255 motion. *Williams v. United States*, 334 F. Supp. 669 (S.D.N.Y.) (Weinfeld, J.), aff'd, 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972). Nevertheless, in view of the frivolous nature of Hodge's claims, we do not dwell on this point, but consider the substance of his motion for the sake of completeness.

standard, the allegations mustered in Hodge's motion, even if taken as true, did not amount to a deprivation of effective counsel.

First, Hodge's claims must be viewed in the context of the strength of the Government's case against him. *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, at 4537 & n.15 (2d Cir., June 30, 1977); *LiPuma v. Commissioner*, 560 F.2d 84, 91 (2d Cir. 1977); *United States ex rel. Marcelin v. Mancusi*, 461 F.2d 36, 43 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973). Here, as Judge Gurfein pointed out at Hodge's sentencing (Tr. 543) and as is apparent from a review of the record, the Government's case against Hodge was overwhelming, simple and straightforward. At trial, Hodge's guilt was established by bank surveillance photographs which clearly depicted him in the course of several robberies, an in-court live identification by a teller-witness, fingerprint evidence and defendant's post-arrest confession, as well as the corroborative physical evidence found at the time of his arrest.

Similarly, at the suppression hearing the evidence clearly established probable cause for Hodge's arrest, that the clothing items and the eyeglasses seized were in plain view, and that the bait bill was discovered pursuant to a reasonable search—made for the arresting agent's own protection—of trousers to be worn by Hodge. Moreover, while Hodge now asserts that his counsel could have done a better job in attacking the search, he makes no claim with respect to his damaging statements at FBI headquarters which were made after he was advised of his constitutional rights.

The record is clear that even in the face of this overwhelming evidence, Hodge's trial counsel, Mr. Rosenbaum, represented Hodge forcefully and diligently both at the suppression hearing—where he made the appropriate motions—and at the trial that followed, actively advocating

the position of his client. This included vigorous cross-examination at both hearings and well-reasoned and thorough arguments to the Court and the jury concerning the Government's case. See e.g., *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233 (2d Cir.), cert. denied, 404 U.S. 967 (1971); *United States ex rel. Ortiz v. Sielaff*, 542 F.2d 377 (7th Cir. 1976); *United States v. Ladley*, 517 F.2d 1190 (9th Cir. 1975); *United States v. Flannery*, 467 F.2d 201 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

Hodge argues that he nonetheless was denied effective assistance of counsel because Rosenbaum failed to investigate sufficiently the circumstances surrounding his arrest and instructed him not to testify at the suppression hearing. In connection with the first allegation, Hodge asserts that Rosenbaum was inexperienced, that he visited Hodge on only three occasions prior to the trial, that he did not discuss the facts and circumstances of the arrest or the post-arrest statements with Hodge, and that he failed to interview certain of Hodge's relatives concerning these events. These contentions, even viewed in the extreme, do not establish ineffective assistance of counsel.

Neither mere inexperience of an attorney, *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 638-39 (7th Cir.), cert. denied, 423 U.S. 876 (1975);* nor the brevity of consultation, establishes ineffective assistance of counsel, *United States v. Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975);

* There is no evidence in the record to support Hodge's assertion that Mr. Rosenbaum was inexperienced. Judge Gurfein's statement that to protect the record he would intervene at the trial more than he ordinarily would, is quoted out of context in Hodge's brief. Br. at 4, 8. Judge Gurfein said that he would intervene not because of counsel's inexperience but because of Hodge's protest regarding his appointed counsel. (Tr. 96).

United States v. Tribote, 297 F.2d 598 (2d Cir. 1961); *Daugherty v. Beto*, 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 936 (1968); *United States v. Waters*, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972). The issue in estimating the competence of counsel is not the amount or nature of pretrial preparation but how well counsel acted at the proceedings and the quality of those proceedings. *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961); *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 639 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). Since the focus is on the actual conduct of the trial, mere claims that counsel failed to consult sufficiently with his client and failed to explore or prepare the facts of the case in detail have consistently been held not to establish ineffective assistance of counsel. See, e.g., *United States v. Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961); *United States v. Waters*, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972); *Harshaw v. United States*, 542 F.2d 455, 457 (8th Cir. 1976) (failure to conduct investigation); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) (failure to interview key trial witnesses). Decisions not to call witnesses and not to pursue certain avenues of investigation are matters that the courts leave to the discretion of trial counsel. See *United States v. Yanishefsky*, 500 F.2d 1327, 1332 (2d Cir. 1974); *United States v. Flannery*, 467 F.2d 201 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Sherrill v. Wyrick*, 524 F.2d 186 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States v. Ladley*, 517 F.2d 1190 (9th Cir. 1975). See also *United States v. Daniels*, 558 F.2d 122 (2d Cir. 1977) (no deprivation of effective assistance of counsel

in attorney's failure to demand pre-trial *Wade* identification hearing).

At the suppression hearing in this case, Rosenbaum, having properly made a motion to suppress evidence seized without a warrant, did what he could to impeach the testimony of the agents who testified both as to probable cause for the arrest and the seizure of contraband in plain view or incidental to arrest. As Judge Lasker determined upon a careful and thorough review of the record of the hearing, Rosenbaum's conduct of the hearing manifested a "fully adequate investigation into the manner in which items were seized from Hodge's home. . . ." (A. 10a). Thus, even if it is assumed that Rosenbaum never discussed the arrest with Hodge—(*but see* pages 17-18 *infra*)—his representation at the hearing must be considered to have been more than adequate.*

Hodge's argument that he was prevented from testifying at the pretrial suppression hearing likewise is insufficient to support the claim that he was denied effective assistance of counsel. The decision as to which

* In fact, Hodge's present version of the circumstances of his arrest would not have vitiated the search and its immediate fruits; a conclusion recognized by Judge Lasker in his decision on Hodge's motion. (A. 10a). Many of the items seized were in plain view—a fact not disturbed by Hodge's contentions. Moreover, since Hodge was required to dress before he was removed to FBI headquarters, the agents would have been entitled to conduct a protective search of his pants, even under the events which Hodge now claims transpired. Finally, the voluntariness of Hodge's post-arrest confession never seriously has been challenged. Thus, if Hodge's present version of the arrest had been presented to and believed by Judge Gurfein, it would have resulted in no more than suppression of perhaps one or two pieces of corroborative evidence. This result hardly would have affected the weight or quality of the Government's proof at trial, and thus cannot possibly be claimed to have made his trial a "farce and mockery".

witnesses to call including the defendant at a suppression hearing, is a matter particularly for the judgment of trial counsel, whose judgment will not be second-guessed by the courts upon a claim of ineffective assistance of counsel. *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 238 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *Nance v. United States*, 440 F.2d 617, 620 (7th Cir.), *cert. denied*, 404 U.S. 845 (1971); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963); *United States ex rel. Mitchell v. LaVallee*, 417 F. Supp. 154, 158 n.6 (S.D.N.Y.), *aff'd*, 551 F.2d 301 (2d Cir. 1976); *Ennis v. LeVre*, Dkt. No. 76-2155, slip op. 5205 (2d Cir., Aug. 9, 1977); *United States v. Ladley*, 517 F.2d 1190, 1194 (9th Cir. 1975). Moreover, the decision not to call Hodge as a witness at the suppression hearing in this case made eminent practical sense. First, if Hodge had testified, his testimony later could have been used to impeach him at trial if he testified in his own defense. See *Harris v. New York*, 401 U.S. 222 (1971). Second, and more significantly, Hodge's own version of the events, even as now claimed, would not have resulted in the suppression of significant evidence. See footnote at page 16, *supra*. Indeed, as Judge Lasker held, trial counsel in this case cannot be faulted for his choice:

"The decision that Hodge should not take the stand was a reasonable exercise of a trial attorney's discretion to determine the best manner of presenting his client's case. [Citation omitted]. This attorney may well have concluded that the testimony of Hodge, a drug addict with a record of prior criminal convictions, would not be believed by the court which tried the facts." (A. 10a-11a).

As a final matter, even though Hodge's allegations if taken as true would not have entitled him to post-conviction relief, it bears emphasis that the files and records in this case make particularly suspect defendant's much-belated claims. In the course of his trial, Hodge on

several occasions asked Judge Gurfein to replace his counsel. At no time, however, did Hodge assert as the basis for his request that Rosenbaum was unprepared, failed to talk with him about the facts of the case, or refused to permit him to testify at the suppression hearing—allegations which now form the basis of defendant's 2255 motion. Instead, the plain thrust of Hodge's complaints during trial was that his counsel was performing the proper function—directing the defense at trial—rather than merely acceding to Hodge's own demands to control the tactical decisions to be followed.* Moreover throughout the trial Judge Gurfein specifically remarked on Rosenbaum's fine and able representation and complimented the attorney for a job well done in the face of an overwhelming case. (*See, e.g.*, Tr. 6, 44, 542, 544). Nor does Hodge's present motion in any way explain how Rosenbaum was able to make the timely suppression motion if, as now is claimed, counsel never had discussed the circumstances of Hodge's arrest with the defendant himself. Indeed, Rosenbaum's affidavit submitted in connection with the suppression motion specifically referred to "conversations with the defendant, David Hodge" as the basis for the motion. (A. 3a). In these circumstances, particularly where Hodge failed to pursue his alleged claims through a new and different counsel on direct appeal from his conviction, the present Section 2255 motion surely sounded hollow.**

* At the point when Hodge first demanded a new counsel on the unsupported claim that "he hasn't spent enough time on my case", Judge Gurfein observed in a lengthy colloquy that Hodge's motion was a "dilatatory tactic", and that Rosenbaum was "quite competent" as defendant's attorney. (Tr. 4-6).

** Hodge's claim that Rosenbaum failed to interview his relatives is equally suspect. No affidavit was proffered from any of these claimed witnesses, nor did Hodge indicate how their testimony allegedly would have helped him.

In sum, the record in this case establishes beyond any doubt that Hodge received adequate representation at all stages in the proceedings which resulted in his conviction. Since by no proper interpretation of Hodge's 2255 motion was he entitled to post-conviction relief, Judge Lasker's exercise of his discretion to deny the motion, without a hearing, was correct and proper. *Sanders v. United States*, 373 U.S. 1, 20 (1963); *Machriboda v. United States*, 368 U.S. 487, 495 (1962).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

KENNETH V. HANDAL,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

APPENDIX

Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indict. #73 Cr. 827

73-2691

UNITED STATES OF AMERICA,

—V.—

JAMES COPELAND, MELVIN DAVIS and DAVID HODGE,
Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of Richard G. Rosenbaum, sworn to the 10th day of October, 1973 and upon all proceedings heretofore had herein, the undersigned will move the United States District Court for the Southern District of New York on the 15th day of October, 1973 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, before Judge Murray I. Gurfein for an Order:

(A) Suppressing all evidence oral or tangible obtained from the defendant, David Hodge directly or indirectly on the grounds that the evidence seized was obtained in violation of the defendant's constitutional rights.

(B) Suppressing all admissions and/or confessions obtained from the defendant on the grounds that such confessions or admissions were obtained in violation of the defendant, David Hodge's constitutional rights.

Motion to Suppress

(C) Granting the defendant, David Hodge such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
October 10, 1973

Yours, etc.,

SCHECHTER & ROSENBAUM
Attorneys for Defendant—David Hodge
225 Broadway
New York, New York 10007
(212) 962-1058

To:

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney

Affidavit of Richard G. Rosenbaum
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Indict. #73 Cr. 827

UNITED STATES OF AMERICA,

—v.—

JAMES COPELAND, MELVIN DAVIS and DAVID HODGE,
Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK ss:

RICHARD G. ROSENBAUM, being duly sworn deposes and says:

That I am the attorney for the defendant, David Hodge and make this affidavit in support of the annexed motion.

That based upon conversations with the defendant, David Hodge there is reason to believe that evidence obtained from him was taken in violation of his constitutional rights. Said defendant advises me and I have reason to believe that a search was made of his home and person without the benefit of a search warrant and without said search being incidental to or during the course of a lawful arrest, and without probable cause.

In addition I am advised by said defendant, that certain statements were illicitly obtained from him at a time when he was extremely ill and unable to make any rational decision.

Affidavit of Richard G. Rosenbaum

WHEREFORE, it is respectfully requested that hearings be conducted on the issue of lawful search and seizure and on the issue of voluntariness with respect to any admissions or confessions obtained.

Sworn to before me this
12th day of October, 1978

.....
RICHARD G. ROSENBAUM

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2122

DAVID HODGE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

LASKER, D.J.

David Hodge moves under 28 U.S.C. § 2255 to vacate the fifteen year sentence imposed upon him by Judge Gurfein on November 30, 1973 following a jury verdict of guilty on four counts of bank robbery rendered on November 1, 1973. Hodge alleges that he was denied the right to proceed *pro se* in his own defense at his criminal trial; alternatively, he claims that he was denied the effective assistance of counsel.

A review of the trial transcript and of the papers filed in the instant motion reveals that Hodge never requested to represent himself. As the government points out in the affidavit of Assistant United States Attorney James Moss, "it was petitioner's express request that his counsel be replaced by another attorney." *Faretta v. California*, 422 U.S. 806 (1975), decided two years after this trial took place, held that a defendant who knowingly

Memorandum

waived counsel and requested to represent himself was constitutionally entitled to do so. Hodge's failure to request to represent himself critically distinguishes *Faretta*. The context in which he made his objections to continuing with his trial counsel makes clear that his request was not to represent himself but to be represented by another counsel, and for a continuance to permit the substitution to take place. (Tr. 4-5) *Faretta* may not be applied retroactively to vacate validly obtained judgments of conviction where the defendant never requested to represent himself, even if the district court neglected to advise the defendant that he had a right to proceed *pro se*. Cf. *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964).

The issues posed by Hodge's alternate claim, that he was denied effective assistance of counsel, cannot be resolved at this time. At the beginning of his trial, Hodge forcefully objected to the representation he had been receiving from assigned counsel. Among the reasons he gave for that dissatisfaction was that counsel had visited him only three times in preparation for the case, which Hodge felt to be inadequate. Judge Gurfein ruled then, and again when objections were raised at sentencing, that trial counsel had been providing competent and diligent representation.

The government urges that the petition be dismissed because Hodge has not "submitted an affidavit from his appointed attorney concerning this allegation; nor has he submitted a personal affidavit waiving his attorney client privilege, explaining his failure to provide an attorney's affidavit, and setting forth in reasonable detail the facts that support his claim of ineffective assistance of counsel."

Memorandum

(Govt. Memorandum at 9) Although there is no doubt that sufficiently specific facts must be set forth in support of the claim before a hearing will be ordered, it is not appropriate to extend the reasoning of such cases as *United States v. Welton*, 439 F.2d 824, 826 (2d Cir. 1971) and *Grant v. United States*, 451 F.2d 931 (2d Cir. 1971) (which held that a supporting affidavit from the attorney should be submitted in support of an attack on a guilty plea) to cases in which the claim of ineffective assistance of counsel is predicated on lack of trial preparation.

Hodge has not specified in what degree counsel's alleged inadequacy in preparation actually prejudiced his case at trial, nor the nature of the disagreements which he may have had with counsel concerning trial strategy. At sentencing Hodge stated that he had disagreed with counsel over the decision that Hodge should not testify at trial. The government is correct that normally such a claim is not sufficient to establish ineffective assistance of counsel. Although denial of the petition might be warranted at this point in the absence of more specific factual allegations, see *Dalli v. United States*, 491 F.2d 758, 761 (2d Cir. 1974), in light of record evidence of Hodge's early and continuing dissatisfaction with trial counsel it is in the interests of justice to appoint counsel to represent Mr. Hodge on that portion of his motion which asserts a denial of the right to effective assistance of counsel. See *Haines v. Kerner*, 404 U.S. 519 (1972). The appointment is made, at least initially, for the limited purpose of assisting the court in deciding whether an evidentiary hearing is necessary or whether it can be said that the files and records of the case conclusively show that Hodge is not entitled to relief. Accordingly, the court appoints Robert A. Margolin pursuant to 18 U.S.C. § 3006A(g) to represent Mr. Hodge on this motion. Counsel is directed

Memorandum

within forty-five days to file a brief and any other necessary documents in support of Hodge's claim that his appointed trial counsel's inadequate preparation and/or Judge Gurfein's denial of Hodge's request to change counsel at the beginning of the trial resulted in a denial of his constitutional right to the effective assistance of counsel. After reviewing these papers the court will notify the government if a response is necessary.

It is so ordered.

Dated: New York, New York
March 17, 1977.

MORRIS E. LASKER
U.S.D.J.

Endorsement

DAVID HODGE, Petitioner v. UNITED STATES, Respondent.

76 Civ. 2122

LASKER, D.J.

David Hodge, who is presently serving a fifteen year sentence for bank robbery and use of a dangerous weapon, petitions for a hearing for post conviction relief pursuant to Title 28, United States Code § 2255. He alleges that he was denied his constitutional right to proceed *pro se* and the effective assistance of counsel at trial. The petition is denied.

Hodge did not request to represent himself at trial. He did on several occasions express dissatisfaction with his court appointed attorney. (Trial Transcript at 3, 4, 44 and 537). A demand to dismiss an attorney is not, however, equivalent to a request to proceed *pro se*. Such a request must be clearly stated in order to avoid giving a defendant an unjustified opportunity to upset an adverse verdict after trial. *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945). Hodge states that he was unaware of his right to represent himself and, citing *Faretta v. California*, 422 U.S. 806 (1975) for the existence of this right, argues that the trial judge was required to advise him of it. The rule in this circuit is that a trial judge is not obliged to inform the defendant of his right to represent himself. *United States v. Clausell*, 389 F.2d 34, 35 (2d Cir. 1968); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15-16 (2d Cir. 1965). This rule has not been reconsidered by the Second Circuit following the holding of *Faretta*. Even if the rule should be changed, it is unlikely that such a decision would be given retroactive effect since this would subject the proceedings in countless criminal cases to re-examination.

Endorsement

Petitioner also alleges that he was denied effective assistance of counsel. On two occasions during the trial Judge Gurfein expressly noted that he found defense counsel's performance to be satisfactory. (Trial Transcript at 5 and 543). Because petitioner failed to raise the point on appeal, the appellate court did not rule on the issue. Nevertheless, Hodge now claims that his trial attorney's alleged incompetence was prejudicial at a suppression hearing in two respects: he failed to present petitioner's account of the circumstances surrounding seizure of evidence upon petitioner's arrest and statements by petitioner made in detention, and he refused to allow his client to testify at trial.

We have examined carefully both the transcripts of the suppression hearing and the trial. While there are differences between the facts described by Hodge in his brief and the facts presented by his attorney at the suppression hearing and the trial, the discrepancy is marginal and certainly not enough to meet the heavy burden necessary to show failure of adequate representation. The transcript of the suppression hearing indicates that petitioner's attorney made a fully adequate investigation into the manner in which items were seized from Hodge's home and statements were taken from him at F.B.I. headquarters. In no respect was the presentation "so incompetent as to deprive his client of a trial in any real sense. . . ." *Mitchell v. United States*, 259 F.2d 787, 793 (2d Cir. 1958), *cert. denied*, 358 U.S. 850 (1958); *United States v. Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States v. Vincent*, 496 F.2d 641 (2d Cir. 1974). The decision that Hodge should not take the stand was a reasonable exercise of a trial attorney's discretion to determine the best manner of presenting his client's case. See *Ennis v. Le Vre*, Docket No. 76-2155 (2d Cir., Aug.

11a

Endorsement

9, 1977). This attorney may well have concluded that the testimony of Hodge, a drug addict with a record of prior criminal convictions, would not be believed by the court which tried the facts.

The petition is denied.

It is so ordered.

Dated: New York, New York
September 19, 1977

MORRIS E. LASKER
U.S.D.J.

★ U. S. Government Printing Office 1977—

7-1 359-720

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH V. HANDAL being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 6th day of January, 1978,
he served ^{two copies} ~~a copy~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Robert A. Margolin
Margolin & Margolin
P.O. Box 711
21 Redwood Lane
Smithtown, N.Y.

11787

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Kenneth V. Handal

Sworn to before me this

6th day of January, 1978

Patrick H. Barth
PATRICK H. BARTH
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4526297
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1979